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No. 77-1452

In the Supreme Court of the United States

OCTOBER TERM, 1977

ADOLPH LEWIN and JOYCE LEWIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Adolph Lewin and Joyce Lewin, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the Tax Court of the United States entered on November 24, 1976.

OPINION BELOW

The opinion of the Court of Appeals is officially reported at 569 F.2d 444. It is also printed in the Appendix to this Petition. (App. A., p. App. 1).

JURISDICTION

Judgment of the Court of Appeals was entered on January 12, 1978 (App. B p. App. 9). The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

STATUTE INVOLVED

26 U.S.C., (1970 Ed.) Section 6212:

"Notice of Deficiency

"(a) In general. — If the Secretary or his delegate determines that there is a deficiency in respect of any tax imposed by subtitles A or B, or Chapter 42, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

"(b) Address for notice of deficiency—

(1) Income and gift taxes. — In the absence of notice to the Secretary or his delegate under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, or Chapter 42, if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, or chapter 42, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence."

QUESTIONS PRESENTED

1. Is it sufficient to exonerate the statutory obligation of the Respondent under Title 26, U.S.C. §6212 to give Notice of Deficiency for him to send a certified letter to the address shown on the tax return and when said letter is returned unopened and undelivered with a 68-day period yet to run before the 90-days are exhausted after the date of mailing, and when other places where notice can reasonably be effected are disclosed by the file, the records, and known to the Respondent?

2. Is not the decision of the Seventh Circuit finding the affirmative of the question presented above in conflict with this Court's concepts of due process as expressed in *Robinson* v. *Hanrahan,* 409 U.S. 38, as well as conflict with the Fourth Circuit in *Lubring* v. *Glotzbach,* 304 F.2d 556, the Ninth Circuit in *Welch* v. *Schweitzer,* 106 F.2d 885, and the Third Circuit in *Berger* v. *C.I.R.,* 404 F.2d 668?

3. Is the address shown on the return synonymous with the "last known address" as that term is used in §6212?

4. Does a mailing to the address shown on the return, regardless of the known business addresses which the Commissioner of Internal Revenue used in negotiation with the taxpayer's business return and for the seizure of the taxpayer's stock-in-trade toward satisfying the deficiency, create a presumption of notice sufficient to satisfy the due process guaranteed under the Fifth Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

A Statutory Notice of Deficiency dated June 18, 1973, was sent by certified mail to the Petitioners at their residence address at 2501 Pebbleford Lane, Glenview, Illinois 60025.

The 90-day period for the filing of a Petition with the Tax Court after June 18, 1973 expired on September 16, 1973. The Petition here (Doc. 2) was filed in the Tax Court on April 25, 1974, which date is 311 days after the mailing of the Notice of Deficiency and over 220 days after the said expiration date.

On July 14, 1974, the Respondent filed a Motion to Dismiss for lack of jurisdiction. (Doc. 4) On July 17, 1974, Petitioners filed an Objection to Respondent's Motion to Dismiss on the ground that the Petition was not timely filed. (Doc. 6) The Tax Court set the Motion down for hearing on the Tax Court calendar in Chicago, Illinois, on October 8, 1974. On October 8 and 9, 1974, a hearing was had on said Motion.

Briefs were filed, and on November 24, 1976, the United States Tax Court filed a Memorandum Opinion (T.C. Memo. 1976-355), a copy of which is attached hereto as a part of the Appendix. Pursuant to said Memorandum Opinion the Tax Court ordered that the Respondent's Motion to Dismiss the case for lack of jurisdiction on the ground the Petition was not timely filed within the period prescribed by law was granted and the case was dismissed. This Order was entered on November 29, 1976.

The Petitioners herein filed a timely Notice of Appeal. The Court of Appeals for the Seventh Circuit affirmed the decision of the United States Tax Court on January 12, 1978. (Appendix B).

The facts are, that the Respondent mailed the "Notice" on June 18, 1973, by certified mail. A United States Postal Service employee, a mailman, testified his record[1] disclosed he twice attempted personal delivery and he left a printed

[1] He had no personal memory of the incident.

form in the mailbox of the Petitioners' residence indicating that an otherwise unidentified piece of certified mail was at the local post office.

When the piece of certified mail was not claimed by the petitioners, it was returned to the Respondent's office, unopened and clearly undelivered, arriving there on about July 10, 1973. This left a 68-day period to run if the 90-day Notice provisions of Section 7503 of the Internal Revenue Code of 1954 were considered to have begun on the date of mailing.

Mrs. Farmer, of the Internal Revenue Service, admitted that after the Notice of Deficiency was returned to her office, no effort was made by her, her superior, or anyone, to effectuate delivery at any other address known by examination of the files. (Tr. 32) There is also testimony that once a letter was returned by the Post Office marked "unclaimed" no further effort to effectuate delivery is, nor was, made. (Tr. 38) She simply placed the returned communication in a file to await the expiration of the ninety days from the date on the Notice of Deficiency, and then declared a default. This, she testified, was the regular procedure at the Internal Revenue Service office.

Glenview, Illinois, is a northern suburb of the City of Chicago. The address on the communication is the residence of the petitioners, and was the address used by them in making the return affected by the Notice of Deficiency. Both Petitioners testified they had not received the printed form indicating the existence of certified mail matter at the post office.

The male petitioner had been the subject of certain criminal charges by the United States Government arising from allegations of Internal Revenue violations. Those charges are the source of the alleged tax deficiency. Ultimately he entered a plea of guilty to one count.

Prior to the entry of the plea, Revenue Agent Walker contacted Mr. Robert Agron, petitioners' accountant at his Chicago office, and at that time wished to discuss Lewin's civil liability. Mr. Agron requested that Mr. Walker await the determination of the criminal case to which Mr. Walker agreed. Respondent was well aware of Mr. Agron's position and location. Upon examination, Walker also admitted that he knew Mr. Edward J. Calihan, Jr., the male petitioner's legal representative, who, then and now, maintains offices across the street from the United States Courthouse in Chicago, and presently directly across from the Internal Revenue Service. Agent Walker had also spoken to Mr. Calihan about the petitioners. (Tr. 113)

The evidence also demonstrated that Mr. Walker, the Revenue Agent, had had personal contact with the petitioner Adolph Lewin since 1970 and at every instance contacted him at his business address in the loop area of Chicago; that there had been contacts at least a half dozen times, and that when Agent Walker brought the Special Agent into the case, they always contacted Lewin at his business address, 5 North Wabash Avenue, Chicago, Illinois. He never contacted Mr. Lewin at his Glenview residence. (Tr. 121)

The first occasion on which Petitioner Adolph Lewin had any knowledge of the statutory Notice of Deficiency was when he was served with a demand for payment in excess of $161,000 from the Kansas City office of the Internal Revenue Service. Petitioner thereupon called his attorney who made an effort to secure a copy of the statutory Notice of Deficiency.

The evidence further demonstrated that the attorney for the petitioners had a great deal of difficulty in attempting to secure a copy of the Notice of Deficiency, and ultimately

was obliged to secure the services of Mr. Trader, in charge of special procedures in the Chicago office of the Internal Revenue Service, for that purpose. Sometime in February, the statutory Notice was delivered to Mr. Calihan and a Petition was filed shortly after actual receipt of the Notice.

Shortly after the filing of the Petition in the Tax Court, the Internal Revenue Service was enough aware of the business address of Mr. Lewin to make a seizure of his entire stock-in-trade in his office, to apply against the deficiency proposed in the Notice.

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in this case for several reasons.

1. The most singularly important reason is that the decision espouses a harsh and severe interpretation of Section 6212 of the Internal Revenue Code, which is applicable to millions of taxpayers and which is fundamentally contrary to concepts of due process.

It seems inconsistent that the Seventh Circuit could find the procedure here satisfactory to the dictates of due process (App. 2) when the same Court in *Dilks* v. *Blair,* 23 F.2d 831, found

> "[a]ssessment and collection of a tax upon a mere mailing of notice of it to the taxpayer is at best drastic and summary, though perhaps necessary, and the least the assessing officer can do to protect the taxpayer is to send the notice to such address as will be most likely to reach him, so far as the proceedings may disclose such address."

It is plain that when "drastic" and "summary" procedures, that do not require the minimum of conscientiousness on the tax collector, are employed, that is not due process within the ambit of ordinary understanding.

The jurisdiction of the Court below is found in the availability of the "pay and sue for refund" procedures.[2] Car-

[2] "We also note that the appellants in their briefs in this court raise a question of due process. We find no merit in this constitutional claim. Persons in the taxpayers' position have the (footnote continued)

rying that reasoning to its logical conclusion, the decision would tolerate any failure of an attempt by the Respondent to give notice to avail the Tax Court relief. In other words, the Seventh Circuit tells us that the beneficent Congressional refuge is to be grudgingly applied and jealously withheld if withholding can, in any way, find facial justification; that the Tax Court relief of litigation before payment is a privilege, not a right, and that the taxpayer is no worse off than if the privilege had not been awarded by the Congress. We submit this thinking is diametrically opposed to this Court's rationale in *Robinson* v. *Hanrahan,* 409 U.S. 38. *Robinson* is a forfeiture case, again a beneficent Congressional enactment. The finding of due process in this case is diametrically in conflict with this Court's holding that:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested persons of the pendency of the action and afford them an opportunity to present their objections." (409 U.S. at 39-40)

The lower court relied (see fn. 2, infra) on *Cohen* v. *United States,* 9 Cir., 297 F.2d 760, where notice was identical with the procedures in *Robinson,* now disavowed as constituting notice. As such, the basis for its decision clearly conflicts with the present-day thinking of this Court.

(footnote continued)

constitutionally adequate remedy of paying the tax and then instituting a refund suit, with the result that failure to receive the deficiency notice, where there has been compliance with the statutory procedures for notice, and the consequent loss of access to the Tax Court violates no constitutional safeguards. *See Phillips* v. *Commissioner,* 283 U.S. 589 (1931); *Brown* v. *Lethert,* 360 F.2d 560, 562 (8th Cir. 1966); and *Cohen* v. *United States,* 297 F.2d 760, 772 (9th Cir. 1962)."

Thus, when the Seventh Circuit calls upon this Court to supply its due process endorsement through the invocation of *Phillips* v. *Commissioner,* 283 U.S. 589, it does not do so in reflection of present-day reality. As this Court has so often reminded the people protected by, and the Courts operating under, our Constitution, that Constitution is a living, not a static, instrument. It adapts to the realities. Only thus does it maintain its viability. In 1931, when *Phillips* was decided, there were not hundreds of millions of taxpayers. The man who paid income taxes in 1931 was the richest man in town. In 1931 the tax rate was not up to 90%. It was so minimal that payment and suit for refund created no hardship. This Court pointed out in the *Phillips* decision (pp. 673-674) that in those halcyon days there was no notice of deficiency until after substantial negotiations were had between the Internal Revenue Service and the taxpayer concerning their dispute. Only when the impasse was recognized was the ultimate—then infrequent—proposed deficiency declared. To put today's taxpayer in the position of *Phillips* is to deny reality, and, in so doing, deny the pulsating vitality of constitutional concepts.

Today, Mr. Phillips' lowliest servant would be a tax target; today, the tax ratio to income is substantial; today, the "substantial negotiations" are not even a memory, and the assessment made is the highest conceivable, imaginable, demand, which even the Respondent does not expect to realize if the taxpayer is allowed his chance at contest.[3] Cases such as *Lubring* v. *Glotzbach,* 4 Cir., 304 F.2d 556, where there was a $3,000 assessment do not equate with a

[3] The Seventh Circuit also relied on *Brown* v. *Lethert,* 8 Cir., 360 F.2d 560. Since that case was a suit to enjoin tax collection contrary to absolute prohibition of such an action under T. 26 U.S.C. §742(a), we do not allude to its dictate.

$161,000.00 assessment here. This Court knows that kind of money cannot be come by except by those persons who were paying taxes in 1931. It can't be borrowed with the assessment a matter of record, except by posting equal, or more, collateral. It can't be found at all by a businessman, whose stock-in-trade has been seized toward satisfying the very assessment in contest.

It is our submission the decision is in direct conflict with applicable decisions of this Court, of which *Robinson* v. *Hanrahan* (supra) is illustrative.

2. Secondly, it makes Congressional enactments mutually contradictory, offering the beneficent relief of the Tax Court procedures available in one breath, and tolerates avoiding access to those benefits by Internal Revenue's practices.

The purpose of the Statute is the enabling of the taxpayer to challenge the proposed deficiency in the Tax Court, before payment.

It is expected that there be applied ordinary business principles to the tax business of the government, requiring the Respondent to avail himself of the facilities of his business organization in the performance of his duty to give notice of deficiency.[4] When knowledge of a second place where notice may be given is known to the examining agent—and here the examining agent knew three additional places, that is properly imputable to the Respondent. *Lubring* v. *Glotzbach,* 4 Cir., 304 F.2d 556, 559.

But, contrary to the expectation of the Fourth Circuit's concepts of the manner in which the Respondent should fulfill his statutory duty of supplying notice, the Seventh Circuit considers any feint or knowingly empty gesture in the direction of notice will suffice to deprive the taxpayer of the beneficence Congress intended.

[4] *Welch* v. *Schweitzer,* 9 Cir., 106 F.2d 885.

The decision repels the desired interpretation that such relief-giving statutes receive a cordial reception and liberal application.

This decision conflicts with that general concept, as well as the Fourth and Ninth Circuits in their appraisal of the diligence expected of the Respondent in the exercise of his statutorily imposed obligations.

3. Thirdly, it rewrites the statute. The Congress directed notice be given at "last known address", not the residence address shown on the return being questioned.

The exclusive use of the address posted on the return as the sine qua non of satisfaction of the statutory provision for the notice has unceremoniously been thrust aside when used as a weapon against the Internal Revenue Service. Illustratively in the *Clodfelter* case (*Clodfelter* v. *C.I.R.*, 9 Cir., 527 F2d 754), the notice was mailed to an incorrect address, though actually received. See also *McKaig* v. *Commissioner*, 51 T.C. 331. The taxpayers contended a correct mailing to the "last known address" was necessary to notice under the statute. The contention was summarily rejected, the Court holding *notice* to be the essence of the statute, not formalistic ritual. In *Berger* v. *C.I.R.*, 3 Cir., 404 F.2d 668, hand-delivered notice was given to the taxpayers and their attorneys. Of course, short shrift was made of their contention that notice had not been given by registered or certified mail to their "last known address." *Berger* took the sensical approach, there to assist the Respondent. Here we ask the same approach be given to benefit the petitioners:

> "The Internal Revenue Service is often presented with more than one address for a taxpayer, and where in the course of dealings between the Commissioner and the taxpayer, letters are successfully sent to different addresses, it is unreasonable to assume that one and not the other of the addresses is the last known address for the purpose of giving the deficiency notice." 404 F.2d at p. 671.

When two addresses are clearly known to the Respondent "it is more in line with its statutory duty" to give notice, for him to have mailed notices to both addresses. So held the Third Circuit in *MacKenzie* v. *D.C. Employment Compensation Board*, 393 F.2d 659, in satisfying notice to a "last known address" when statutorily required.

In the fact circumstances here, this decision is directly in conflict with the Third Circuit, as well as the Fourth and Ninth Circuits discussed under the next preceding point.

4. Fourthly, the decision tolerates a practice of conscientiously withholding the Notice Congress intended be given.

There can remain no doubt that Section 6212 was intended to reflect the legislative plan for notifying the taxpayer of a proposed deficiency and contemplates such notice be given where it can reasonably be achieved.[5]

The Internal Revenue practice testified to in the instant cause is in direct contrast to Internal Revenue practice otherwise testified to. In the Seventh Circuit's own *Eppler* case, (*Eppler* v. *C.I.R.*, 188 F.2d 95), a practice was recited that "when a notice of deficiency is mailed out and returned because the postal authorities are unable to make delivery at the address used, it is the custom to forward the notice unregistered if another address for the taxpayer is discovered." Commending the practice, the Court observed that "if several addresses of the taxpayer are disclosed in the proceedings, it would entail no hardship on the Commis-

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[5] *Clodfelter* v. *C.I.R.*, 9 Cir., 527 F.2d 754, 756, points out that "the mailing authorized by §6212(a) is a means to that end. 'Last known address' is not even mentioned in that subsection. A mailing that effectively results in actual notice is what is apparently contemplated by the legislative plan."

sioner to send a copy of the notice to each address of the taxpayer which the papers and records in his possession disclose.'' Quoting from *Dilks* v. *Blair,* 7 Cir., 23 F.2d 831, 832.[6]

In this case the records clearly reflect the male petitioner's business address, his accountant's address, his lawyer's address. There is no justification for the Seventh Circuit's acceptance that only the address shown on the return constitutes ''last known address.'' Especially in these circumstances where notice is knowingly not given; that overtures for negotiations were earlier made at the accountant's address, and where the business address for seizure toward satisfying the undelivered assessment was the usual meeting place.

This decision has devitalized the notice requirement, actually contrary to its own convictions expressed in *Dilks* v. *Blair, supra.*

CONCLUSION

Wherefore, for the above and foregoing reasons, the petitioner herein respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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[6] Sometimes there will, of course, be no other clue as to where notice can be effectuated. See *Lubring* v. *Glotzbach,* 4 Cir., 304 F.2d 556. But even in seemingly harsh cases, *Pfeffer* v. *Commissioner,* 2 Cir., 272 F.2d 383, some attempt is made (service attempted through daughter when notice returned undelivered).

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1273

ADOLPH LEWIN and JOYCE LEWIN,

Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Appeal from an Order of the United States Tax Court
William M. Fay, Judge.

ARGUED NOVEMBER 4, 1977—DECIDED JANUARY 12, 1978

Before CUMMINGS and PELL, *Circuit Judges,* and CAMPBELL, *Senior District Judge**.

PER CURIAM. This is an appeal by the taxpayers, Adolph and Joyce Lewin, from the order of the Tax Court dismissing their petition for a redetermination of income tax deficiencies for the years 1966, 1967, and 1968, the basis of the dismissal being lack of jurisdiction resulting from an untimely filing of their petition.

Upon the basis of the briefs, oral argument, and the record, we are satisfied that the Tax Court reached the

* The Honorable William J. Campbell, Senior United States District Judge for the Northern District of Illinois, is sitting by designation.

correct result for the correct reasons. We, therefore, adopt the Memorandum Opinion of the Tax Court as the opinion of this court, and attach a copy thereof to this opinion as Appendix A. Inasmuch as no precedent in point in this circuit has been brought to our attention,[1] we are entering our decision in this case as a per curiam opinion so that our decision will be generally available through the Federal Reporter system even though the Tax Court Memorandum Opinion is published in various looseleaf services.

We also note that the appellants in their briefs in this court raise a question of due process. We find no merit in this constitutional claim. Persons in the taxpayers' position have the constitutionally adequate remedy of paying the tax and then instituting a refund suit, with the result that failure to receive the deficiency notice, where there has been compliance with the statutory procedures for notice, and the consequent loss of access to the Tax Court violates no constitutional safeguards. *See Phillips* v. *Commissioner*, 283 U.S. 589 (1931); *Brown* v. *Lethert*, 360 F.2d 560, 562 (8th Cir. 1966); and *Cohen* v. *United States*, 297 F.2d 760, 772 (9th Cir. 1962).

AFFIRMED.

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[1] Pursuant to Circuit Rule 11, the appellants did direct our attention to *Eppler* v. *Commissioner of Internal Revenue*, 188 F.2d 95 (7th Cir. 1951). That case is no help to their position as the undelivered notice there was sent to an old address and was not in compliance with the statutory requirement for mailing to the last known address. A second notice was correctly mailed and the petition was timely filed with relation to that notice. Also, pursuant to Rule 11, the appellants have cited *DiViaio* v. *Commissioner of Internal Revenue*, 539 F.2d 231 (D.C. Cir. 1976). That case, in our opinion, supports the result the Tax Court and this court have reached by its emphasis on the necessity that the notice be "mailed to the taxpayer at his last known address," which was not done in *DiViaio* but was done in the present case.

T. C. Memo. 1976-355

UNITED STATES TAX COURT

ADOLPH LEWIN and JOYCE LEWIN, Petitioners
vs.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 2866-74. Filed November 24, 1976.

Edward J. Calihan, Jr. and Anna R. Lavin, for the petitioners.

William L. Ringuette, for the respondent.

MEMORANDUM OPINION

FAY, *Judge*: This matter is before us on respondent's motion to dismiss for lack of jurisdiction, on the ground that the petition herein was not filed within the period prescribed by law. In presenting their position, petitioners acknowledge that the petition was filed more than 90 days after the mailing of the statutory notice of deficiency, but nonetheless maintain that the filing was timely because of certain actions on the part of respondent after the mailing of the statutory notice.

Petitioners Adolph and Joyce Lewin (hereinafter sometimes Adolph or Joyce) resided in Chicago, Illinois, at the time the petition herein was filed. They filed joint Federal income tax returns for the years 1966 through 1968, the last

showing their address at 2501 Pebbleford Lane, Glenview, Illinois.

Prior to the issuance of the statutory notice herein, Adolph was the subject of a criminal investigation for possible violation of the Internal Revenue laws. Ultimately, he pleaded guilty to one count of such a violation. As the criminal matter neared its conclusion, he was informed by his attorney that, subsequent to the disposition of the criminal matter, there would be immediately raised by respondent a question regarding petitioners' civil liability during those years. Having been so advised, Adolph instructed his wife, Joyce, to be alert for the imminent arrival of correspondence from the Internal Revenue Service.

On June 18, 1973, the District Director of Internal Revenue, Chicago, Illinois, mailed to petitioners by certified mail a notice of deficiency for the years 1966, 1967, and 1968. The envelope containing the original notice of deficiency was addressed as follows:

Mr. Adolph Lewin and
Mrs. Joyce V. Lewin
2501 Pebbleford Lane
Glenview, Illinois 60025

On June 19, 1973, a U.S. Postal Service letter carrier attempted to hand deliver the notice to petitioners' residence at 2501 Pebbleford Lane. After knocking at the door and receiving no reply, he left in petitioners' mailbox Postal Service Form 3849, a document which indicates that there has been an attempted delivery of certified or registered mail. On June 29, 1973, a second Form 3849 was placed in petitioners' mailbox.

The envelope containing the notice remained unclaimed and, subsequently, was returned to respondent unopened on July 3, 1973, and received in respondent's Chicago office on July 10, 1973. On its face, it bore a

stamped marking bearing the legend "returned to writer", on which there appeared a penned checkmark in the space opposite a blank labeled "unclaimed". The envelope further bore notations penned by the letter carrier and the Glenview, Illinois post office indicating that notice of its arrival had been given on two occasions.

During the course of her testimony, Joyce stated that she was at her home on June 19, 1973, and each day thereafter through June 29, 1973 between 10:30 a.m. and 12:30 p.m., the time the mail was regularly delivered to her home. She further testified that she received no personal delivery of a statutory notice, nor did she receive in her mailbox a Postal Service Form 3849 indicating that such delivery had been attempted.

Upon its return to respondent's office, the letter was filed and respondent thereafter made no further attempt to deliver the letter to petitioners or to otherwise effectuate notice. On October 1, 1973, petitioners received notification of a tax assessment and a demand for payment.

Petitioners then notified their attorney of the foregoing events who, after some delay, secured a copy of the notice of deficiency and presented it to petitioners on February 1, 1974. Prior to this date, petitioners had never seen the deficiency notice.

The petition herein was filed with this Court on April 23, 1974, 309 days after the notice of deficiency was mailed but 82 days after it was actually in petitioners' possession.

The parties are in agreement that the notice of deficiency was timely mailed in correct form on June 18, 1973, to petitioners' last known address at 2501 Pebbleford Lane, Glenview, Illinois. It is respondent's position simply that the time for filing a petition with this Court expired 90 days later on September 17, 1973, and, therefore, the petition filed herein on April 23, 1974, must be dismissed for lack of jurisdiction.

Petitioners contend that, despite the correctness of the mailing, their filing of the petition herein was timely because of subsequent remiss inaction on respondent's part; that, under the circumstances, the return of the unclaimed envelope to respondent 68 days prior to the running of the 90 days raised a further duty on respondent's behalf to attempt additional measures of delivering actual notice prior to the running of the 90-day statutory period. In view of Respondent's failure to act, they argue, the time for filing a petition in this Court was extended to a period ending 90 days subsequent to February 1, 1974, the date notice was actually received by petitioners.

In view of the fact that, as agreed upon by the parties, the notice was properly addressed and mailed, we are concerned solely with the question of whether the 90-day period for filing a petition with this Court commenced on the date of mailing or the date of receipt.

As a general rule, it is well established that the period described commences with the mailing date of the notice, irrespective of the date of actual receipt by the taxpayer. *Pfeffer* v. *Commissioner,* 272 F.2d 383 (2d Cir. 1959).

Relying on *Estate of Francis P. McKaig, Jr.,* 51 T.C. 331 (1968), petitioners maintain that the circumstances in this case are such as to warrant relaxation of this rule. In that case, respondent mailed the taxpayer a properly addressed statutory notice. While the letter was in transit, the postal service crossed out the correct address and wrote in a new incorrect address. Subsequently, the letter was misdirected and returned to respondent marked "unclaimed." We held that although the initial mailing form may have been proper, the mailing was not completed because the notice had been "diverted" by the Postal Service and respondent knew or had reason to know of it.

The facts now before us, however, involve no such complications. As conceded, the statutory notice was properly addressed and mailed. In accordance with Postal Service procedure for certified mail, the letter carrier attempted to deliver the notice by hand and, after finding no one at home, left Form 3849 in petitioners' mailbox on two occasions. When the statutory notice was not claimed in two weeks' time, it was returned to respondent undelivered.

Upon its return to respondent's office, the envelope containing the statutory notice was unblemished and displayed no extraordinary markings beyond those normally received in transit by unclaimed certified mail. These stamped markings and penned notations indicated only that the letter was being returned for the reason that it was unclaimed.

Among the markings on the face of the envelope, there was nothing that would provide respondent with the knowledge, or alert him to the possibility, that the notice or the Forms 3849 had been either misdirected or otherwise diverted. To the contrary, the envelope had been marked so as to indicate that delivery was attempted on two separate occasions.

During the course of their testimony, petitioners stated that they had been instructed by their attorney to expect the imminent arrival of a notice of deficiency from respondent. They further claimed that, heeding this advice, they kept a lookout for its prospective arrival and received neither the letter nor the Forms 3849 indicating that such mail was being held for them at their post office.

Postal records kept in the ordinary course of business, however, indicate that such was not the case. Rather, these records show that, on two occasions, Forms 3849 were left at petitioners' residence. Petitioners have offered no evidence that would impugn the probity of these records

nor any that would corroborate their story. In view of this documentary evidence and lack of satisfactory explanation to the contrary, we are satisfied that the postal employees involved properly discharged their duties.[1] *Charlson Realty Co.*, 384 F.2d 434 (Ct. Cl. 1967).

Thus, we can find no evidence of diversion from proper mailing procedure in this instance. Proper mailing was effected and would have been completed but for petitioners' failure to claim the letter at the post office. To assert that respondent, having once properly mailed notice to the taxpayer, has a further duty of providing actual notice before expiration of the 90-day statutory period is clearly contrary to the statute[2] and prior decisions of this Court. *Daniel Lifter*, 59 T.C. 818 (1973).

In view of the foregoing, we hold that the statutory notice of deficiency was properly mailed on June 18, 1973, and that the 90-day statutory period commenced to run on that date. Consequently, the petition filed herein on April 23, 1974, did not fall within our jurisdictional requisites. Accordingly, respondent's motion to dismiss for lack of jurisdiction will be granted.

An appropriate order will be entered.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[1] Nor have petitioners explained their apparent failure to contact respondent when the anticipated notice failed to arrive. Once after a demand for payment was presented some four months later did petitioners seek to make inquiries concerning the missing deficiency notice.

[2] See sec. 6212, Internal Revenue Code of 1954.

APPENDIX B

Per Curiam Opinion

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 12, 1978.
Before
Hon. Walter J. Cummings, *Circuit Judge*
Hon. Wilbur F. Pell, Jr., *Circuit Judge*
Hon. William J. Campbell, *Senior District Judge**

ADOLPH LEWIN and JOYCE LEWIN,
Petitioners-Appellants,

No. 77-1273 vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the United States Tax Court.

This cause came on to be heard on the transcript of the record from the United States Tax Court, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the United States Tax Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this court filed this date.

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

Supreme Court, U. S.
FILED
MAY 26 1978
MICHAEL RODAK, JR., CLERK

No. 77-1452

In the Supreme Court of the United States

OCTOBER TERM, 1977

ADOLPH LEWIN and JOYCE LEWIN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1452

ADOLPH LEWIN and JOYCE LEWIN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The sole question presented in this federal income tax case is whether the Tax Court correctly dismissed the petition for a redetermination of a deficiency for lack of jurisdiction on the ground that it was not filed within the period prescribed by Section 6213(a) of the Internal Revenue Code of 1954, as amended, 26 U.S.C.

The pertinent facts are as follows: On June 18, 1973, the Commissioner sent by certified mail a statutory notice of deficiency, correctly addressed to petitioners at their residence in Glenview, Illinois. The records of the Postal Service indicate that the mail carrier found no one home when he first attempted to deliver the notice, and that he left a postal service form 3849 in petitioners' mailbox notifying them of the attempted delivery. Ten days later, when the mail was still unclaimed, the letter carrier left

another notice of attempted delivery. Finally, two weeks after the first notice, the letter was marked "unclaimed" and returned to the Internal Revenue Service. No further attempt to deliver the deficiency notice was made (Pet. App. 4-5).

Several months later, petitioners' attorney obtained a copy of the deficiency notice from the Internal Revenue Service, and, on April 23, 1974, petitioners filed a petition in the Tax Court seeking a redetermination of the deficiency (Pet. App. 5). The Tax Court dismissed the case for lack of jurisdiction because the petition was not filed within 90 days of the mailing of the deficiency notice as required by Section 6213(a) of the Code (Pet. App. 3-8). The court of appeals affirmed (Pet. App. 1-2).

1. Section 6213(a) of the Code generally requires the Commissioner to issue a notice of deficiency relating to income tax liabilities before assessing and collecting the taxes in question. The statute further provides that a petition contesting the Commissioner's determination may be filed in the Tax Court within 90 days "after the notice of deficiency * * * is mailed * * *."[1] Section 6212(a) specifically authorizes the Commissioner to send the notice of deficiency to the taxpayer by certified or registered mail, and Section 6212(b) provides that this notice "shall be sufficient" if mailed to the taxpayer's "last known address."

The statute is clear that the time for filing a petition for a redetermination of the deficiency in the Tax Court runs from the date the Commissioner properly mails the notice of deficiency to the taxpayer's "last known address" and

[1]Where a petition for a redetermination of the deficiency is timely filed in the Tax Court, Section 6213(a) generally prohibits assessment and collection until the Tax Court enters its final decision.

not from the date the notice is actually received. See, *e.g.*, *Wilson* v. *Commissioner*, 564 F. 2d 1317, 1319 (C.A. 9). Here, it cannot be disputed that the notice of deficiency was properly mailed under Section 6212, and that the petition for the redetermination of the deficiency was untimely under Section 6213(a). As petitioners concede (Pet. 3, 5), the notice was mailed to the address that appeared on their return for the year in question and which remained their actual residence at the time the notice was issued. Contrary to petitioners' contention (Pet. 11-14), there is no requirement that the Commissioner issue multiple deficiency notices to all of the various addresses of which he might learn or that he take further steps to send additional notices of deficiency once a properly mailed notice is returned undelivered. See *Brown* v. *Lethert*, 360 F. 2d 560 (C.A. 8); *Luhring* v. *Glotzbach*, 304 F. 2d 556 (C.A. 4); *Williams* v. *United States*, 264 F. 2d 227 (C.A. 6), certiorari denied, 361 U.S. 862.[2]

[2]Indeed, the time for filing a petition in the Tax Court runs from the first proper mailing even where a notice is sent to a new address after the first notice is returned undelivered. *Pfeffer* v. *Commissioner*, 272 F. 2d 383 (C.A. 2). *Eppler* v. *Commissioner*, 188 F. 2d 95 (C.A. 7), upon which petitioner relies (Pet. 13), is not to the contrary. There, the court held that the time would run from a second mailing on the ground that the taxpayer had been misled by the second mailing since he was not advised of the first. See *Boccuto* v. *Commissioner*, 277 F. 2d 549, 553 (C.A. 3). Moreover, it was specifically noted in *Eppler* that "if * * * the second registered letter had not been mailed to the taxpayer the mailing of the first letter would have started the ninety day period of limitations * * *." 188 F. 2d at 98.

None of the other decisions petitioners cite (Pet. 11-14) supports their claim. Both *Clodfelter* v. *Commissioner*, 527 F. 2d 754 (C.A. 9), certiorari denied, 425 U.S. 979, and *Berger* v. *Commissioner*, 404 F. 2d 668 (C.A. 3), certiorari denied, 395 U.S. 905, hold only that the requirements of this statute are satisfied where taxpayers receive actual notice of the Commissioner's deficiency determination whether

2. The court below correctly rejected petitioners' contention (Pet. 9-10) that Sections 6212 and 6213 deprive them of due process because they permit the time for contesting a deficiency determination in the Tax Court to expire 90 days after the mailing of the notice of deficiency whether or not the notice was actually received. The statutory scheme Congress adopted is reasonably designed to assure that the notice of deficiency will be received in the vast majority of cases. Moreover, the statutory period, which begins to run upon mailing, provides the Commissioner with an ascertainable and objective standard for determining when he may assess and collect the tax deficiency.

Taxpayers who do not receive actual notice of the Commissioner's deficiency determinations are not denied their right to challenge the Commissioner's assertions of liability. As this Court pointed out almost 50 years ago in *Phillips* v. *Commissioner*, 283 U.S. 589, they remain free to pay the tax, file claims for refund, and, if those claims are denied, to bring refund suits in the district court or the Court of Claims. In *Phillips*, the

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or not the deficiency notice was mailed to a proper address under Section 6212. *Welch* v. *Schweitzer*, 106 F. 2d 885 (C.A. 9), involved a deficiency notice sent to an address which was neither the "last known address" nor the actual residence of the taxpayer. In *Estate of McKaig* v. *Commissioner*, 51 T.C. 331, the Commissioner was put on notice that a correctly addressed deficiency notice had been improperly diverted by the Postal Service to an incorrect address. As the Tax Court found (Pet. App. 7), no such circumstances were presented here.

Finally *MacKenzie* v. *D.C. Unemployment Compensation Board*, 393 F. 2d 659 (C.A. D.C.), involved not only a different statutory scheme, but also completely distinguishable facts. There, notice of an adverse determination on an unemployment compensation claim was held ineffective where the unemployment compensation board knew that the temporary address to which it was sent had already been abandoned and that the claimant was returning to her permanent address, which was also known to the board.

Court held that these separate refund suits met the requirements of due process without regard to the availability of the alternative prepayment procedures Congress established. Accord: *Cohen* v. *United States*, 297 F. 2d 760, 772 (C.A. 9), certiorari denied, 369 U.S. 865; *Brown* v. *Lethert*, *supra*, 360 F. 2d at 562; *Drake* v. *Commissioner*, 554 F. 2d 736, 739 (C.A. 5); *Wilson* v. *Commissioner*, *supra*, 564 F. 2d at 1319. See also *Berger* v. *Commissioner*, *supra*, 404 F. 2d at 674.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

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[3] *Robinson* v. *Hanrahan*, 409 U.S. 38, upon which petitioners rely (Pet. 9, 11), is distinguishable. In that case, the Court did not hold that procedures such as those prescribed in Sections 6212 and 6213 are unconstitutional. It held only that a notice of forfeiture proceeding sent to the home address of the owner of property was insufficient where the state knew that he was not at that address and would not receive the notice because he was in jail. Moreover, unlike this case, the property owner in *Robinson* was deprived of the only forum in which to seek review of the state's actions.

DOJ-1978-05